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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-719

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL-CIO, et al.,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner's statement of the question presented is incorrect.

The question presented is, as stated in the opinion of the Court of Appeals:

"Whether an employer can abrogate unilaterally and breach a validly executed collective bargaining prehire agreement merely because the agreement was a prehire agreement in the construction industry validly entered into pursuant to Section 8(f) of the National Labor Relations Act." (Pet. App. 2a).

STATEMENT

Respondent, Local 103, briefly adds the following important facts of record to supplement petitioner's incomplete statement:

Respondent, Local 103, filed an unfair labor practice charge against Higdon, charging that it had violated Sections 8 (a) (1), (3), and (5) of the Act, but the Board summarily dismissed same, for the reason that "the only purpose of the picketing was to require the employer to honor its contract with Bridge, Structural and Ornamental Iron Workers, Local 103." (Pet. App. 9a, 17a; Tr. Ex. A to Ex. 1, p. 3).

Respondent Local 103 and the employer, Higdon, have had a collective bargaining relationship since 1968 (Pet. App. 15a). In 1973, after Higdon and respondent entered into the collective bargaining agreement involved in this case, Higdon decided to form a new company, Higdon Contracting Company, Inc., "in order to get around the contract." (Tr. 58).

The new company, Higdon Contracting Company, Inc., was formed solely to evade the contract with the union and was an alter ego for Higdon. The Administrative Law Judge and the Board so found in their decisions, and petitioner ruled that Higdon Contracting Company, Inc., was bound by the aforesaid collective bargaining contract with the union. (Pet. App. 20a, ft. 7).

In addition to issuing the unfair labor practice complaint against respondent Local 103, petitioner applied for an injunction against respondent to enjoin the picketing herein complained of. At the conclusion of the court hearing, the United States District Court denied petitioner's petition for an injunction, sharply criticizing the employer Higdon's conduct in this matter. Petitioner did not appeal the District Court's decision in favor of respondent Local 103. (Tr. 98).

REASONS FOR DENYING THE WRIT

The question presented is not a novel one, nor is there any conflict among the circuits in the settled law which petitioner herein seeks to set aside.

The decision below reaffirms a decision by the Court of Appeals which was handed down over three years ago. Although petitioner states that it was unhappy with that decision, this is weak ground indeed for granting certiorari. Further, petitioner did not appeal that decision nor did it even file a petition for rehearing. (Pet. App. 3a).

The Court of Appeals of the District of Columbia is not the only one to reject petitioner's policy in this area. In 1973, the U.S. Court of Appeals for the Third Circuit reversed petitioner and held that a construction industry employer that enters into an 8(f) contract is not free to repudiate the contract during its term, where the employees have refrained from seeking a representation election, as they have in the case at bar. *N.L.R.B. v. Irvin*, 475 F. 2d 1265 (C.A. 3, 1973).

Petitioner's entire case is based upon its erroneous statement of the issue in speaking of "recognitional picketing." The record is undisputed there was no recognitional picketing. The Administrative Law Judge, the Board itself, and the Court of Appeals also found and stated that the picket signs used by respondent stated the truth, when it said, "Higdon Construction Company is in violation of the agreement of the Iron Workers Local No. 103". Therefore, as the Court below stated, "The union here . . . had been picketing to secure compliance with an existing contract valid under Section 8(f), . . ." (Pet. App. 9a, ft. 4, 18a). However, petitioner insists on incorrectly calling the picketing "recognitional picketing." (Pet. App. 7a, 6a, and 9a; Br. 2, et passim).

Petitioner is in error when it states in its brief that the Court of Appeals assumed the correctness of the Board's conclusion that the picketing in this case was recognitional (Br. 11, ft. 6). Petitioner cites no language in the Court's opinion to support this erroneous conclusion. The Court of Appeals stated that the purpose of the picketing was "to secure compliance with an existing contract valid under Section 8(f)", not to compel employer recognition. (Pet. App. 9a, ft. 4).

The law is clear that, as the courts and the Board have all ruled, picketing by a union to secure compliance with an existing contract is not barred by Section 8(b) (7)(C). *Bay Counties District Council of Carpenters, etc.* (1965) 154 NLRB 1598, enf. 382 F. 2d 593 (C.A. 9, 1967). Yet the Board found the union's picketing in this case was in violation of Section 8(b) (7) (C) solely because of its erroneous ruling that Section 8(f) contracts may be unilaterally abrogated by an employer.

The Board adopted the position of the General Counsel who argued that since the contract in the case at bar was an 8(f) contract, "such contracts may with impunity thereafter, be ignored by the employer. . . ." (Tr. 6).

There is nothing in the language of the Act or its history to suggest that a valid contract can be breached by an employer because it is entered pursuant to the authority expressly conferred by Section 8(f) of the Act.

As the Court of Appeals for the Third Circuit held:

> "Nothing in neither the text nor the legislative history of Section 8(f) suggests that it was intended to leave construction industry employers free to repudiate contracts at will." *NLRB v. Irvin*, 475 F. 2d 1265, 1271 (C.A. 3, 1973).

This is exactly what was done by Higdon in the case at bar. The Court of Appeals for the District of Columbia ruled in accord with the Third Circuit:

> ". . . we can find no sanction in the language, history or policy of Section 8(f) for permitting an employer to abrogate unilaterally a validly executed prehire agreement or for permitting the employer to commit what is otherwise an unfair labor practice even though at the time of either the union has not achieved majority status." *Local No. 150, International Union of Operating Engineers, AFL-CIO v. N.L.R.B.*, 156 U.S. App. D.C. 294, 480 F. 2d 1186, 1190 (1973).

The facts in this case are a clear illustration of the pernicious effects of the Board's decision in *R. J. Smith*, 191 N.L.R.B. 693, which the Court of Appeals was alert to recognize and point out in its decisions in *Local No. 150, etc., supra*, and the case at bar.

> "Moreover, under the Board's interpretation, an employer, unhappy with a pre-hire agreement, can avoid it by discouraging union membership throught flagrant unfair labor practices, thereby insuring that the union never attains a majority." (480 F. 2d at 1190).

Thus, in this case the evidence is replete with unfair labor practices committed by the employer—even to the extent of setting up a dummy corporation "in order to get around the contract." The employer paid wages far below the prevailing wage rate agreed on in the contract and committed other unfair labor practices which were characterized by the learned District Court as "this corporate gymnastics which has been pulled here." (Tr. 58-59, 98).

Yet, when the union filed an unfair labor practice charge against the employer, Higdon, it was dismissed by the Board,

because the Board followed its decision in *R. J. Smith, supra.* (App. 9a, 17a). This not merely allows, but encourages an employer to engage in unfair labor practices.

This completely demolishes petitioner's contention that "the Act contains ample remedies to deter and check employer conduct designed to discourage union membership, including injunctive relief under Section 10(j) . . ." (Br. 19). Let alone injunctive relief, the Board would not even issue an unfair labor practice complaint in this case against the employer's unfair labor practices, which were pointed out by the Court of Appeals, as well as by the District Court.

Since petitioner's concern about employees being subject to contracts made by unions who do not have majority support is met by the proviso in Section 8(f) allowing employees and employers to petition for an election at any time, petitioner is forced to base its entire case on the weak complaint that under the decision of the Court of Appeals, the "burden" is placed upon the employer or employees to file a petition for an election. The Board wants this Court to hold otherwise. However the Act clearly so provides; petitioner would seek to have this Court rewrite the Act.

Further, there is no great "burden" placed upon an employer or employees by requiring them merely to file a petition for an election if any of them believe that the union does not have majority support. The record is barren of a single reason why this could not have been done in this case.

Petitioner's citation of *Linden Lumber Division v. National Labor Relations Board*, 419 U.S. 301, offers it no support. That case did not involve a Section 8(f) agreement. This Court did not in that case sanction an employer's flagrant violation of a contract it voluntarily entered into, after years of bargaining relationship, as was done in the case at bar, where the em-

ployer had the expeditious and reasonable alternative of petitioning for an election if it believed that the contract did not have the majority support of its employees.

Similarly, *Connell Construction Company, Inc. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, is not applicable to the case at bar and offers petitioner no support. *Connell* did not involve an 8(f) agreement, nor does the case at bar involve Section 8(b)(7)(C). Further, this Court recognized in *Connell* that there is special consideration given construction unions by virtue of Section 8(f), "which allows 'pre-hire' agreements in the construction industry, but only under careful safeguards preserving workers' rights to decline union representation." (421 U.S. at 632). Such safeguards were present in the case at bar, but the employer and its employees chose not to use them.

Petitioner would now seek to have this Court rewrite the Act by providing that an 8(f) contract can be voided by an employer, at will, even though the employer and employees failed to exercise any of the safeguards provided therein preserving the workers right to decline union representation. Such an amendment of course is proper only for the legislature; but more important, it would frustrate the very purpose of Section 8(f) in that it would permit an employer to tear up an 8(f) agreement as soon as it entered into one. Section 8(f) does not provide for nor even envisage so absurd and futile a result.

CONCLUSION

Petitioner presents no worthwhile reasons for granting the writ. Nor does the employer, Higdon, who did not file any petition for certiorari or even join in the Board's petition.

There is no need for this Court to take the time to reaffirm settled and correctly decided law because petitioner complains

it "is faced with the choice of either abandoning what it believes to be a correct interpretation of the Act or facing further reversal . . ." (Br. 20). Petitioner is wrong, two Courts of Appeal have held it is wrong, and a careful reading of the statute and of the record in this case again confirms petitioner's error.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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